NO. 86-742

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES A. HARRELL, ET AL.,
PETITIONERS

VS.

JAMES REEVES, ET AL.,
RESPONDENTS

VS.

RAY WILKES, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 42 U.S.C. § 1988 attorney's fees should be employed to sanction intervenors who seek in good faith to enforce their own civil rights when the intervenors' position is in good faith and justified by existing case law at the time it is filed and the sole basis for the sanction is the adjudication as frivolous of the procedural means employed in the light of intervening case law?

PARTIES TO THE PROCEEDING

1. James A. Harrell
   James B. Dean
   Charles P. Gunnells
   Randy A. Moody
   Wayne Ellis
   Anthon T. Strickland, Jr.
   Phillip Mann
   Bennie F. Holmes
   Mike Simmons
   Charles Griffith
   Allen Busbee
   Carey Barbee
   Bill M. McLendon
   Marion C. Brooks
   Rodney Bittick
   Martin S. Gazafy
   David C. Hudson
   Mickey Pearce
   Bob Boren
   Jim Barber
   Walter Allen
   Kirby H. Wincey, Fr.
   Kenneth W. Combs
   Dennis J. Hagerman

Brooks R. Peterson
Neil Godbee
Wayne Hart
Joseph E. Evans
C. Baxter James
James S. Hinson, Fr.
A.L. Woodard, Fr.
W.J. Boney, Fr.
Glen F. Sharpe
Michael Wheat
Joe White
P.T. Grant
L.W. Olmstead
Rufus Holmes
Gary Crutis
Gerald Amos
Gary McKinney
Joe W. Gleaton
Barbara H. Glore
H.B. Hatcher
James S. Defore, Jr.
Clarence B. Self
David L. Montford
Mark Bandy
Martin Ursitti
W. Elliott Dunwoody VI
Charles T. Branch
Marc Lengel
Dennis McCook
Nan Cleveland
Robert E. Sanders
Sharon A. Holley
Harry L. Colbert III
Glenn C. Brickle
David J. Davis
Leonard J. McDaniel, Sr.

2. James Reeves and all Black deputy sheriffs, now employed or to be employed by the Sheriff's Department of Bibb County, Georgia.

3. Ray Wilkes, Sheriff of Bibb County, Georgia; and

4. Robert Young, Giles C. Gibson, Cecil

Kelly, Helen Newby, and James W. Ragland, Jr., members of the Bibb County Civil Service Board.

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OPINIONS BELOW

The opinion of Reeves v. Wilkes is reported at 754 F.2d 965 (11th Cir. 1985), and is printed in the Appendix hereto, infra, page 23. The opinion of Reeves v. Harrell is reported at 791 F.2d 1481 (11th Cir. 1986), and is printed in the Appendix hereto, infra, page 1.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals in Reeves v. Harrell, 791 F.2d 1481 (11th Cir. 1986) (Appendix, infra, page 44) was entered on June 23, 1986. A timely petition for rehearing was denied on August 7, 1986 (Appendix, infra, page 46). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title

"CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of

this title, title IX of Public Law 92-318, or thtle VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On March 24, 1978, James Reeves, a black deputy sheriff employed by the Bibb County Sheriff's Department instituted an employment discrimination action for himself and on behalf of others alleging that Sheriff Ray Wilkes and others had engaged in racially discriminatory practices in hiring, job assignments, and promotions within the Sheriff's Department. On May 24, 1979, a "Stipulation for Settlement" incorporating a proposed Consent Decree was proposed to and thereafter approved by District Court on June 18, 1979.

The Consent Decree imposed mandatory racial quotas in hiring, job assignment, and promotions within the Sheriff's Department.

There were no numeric or temporal limits on the duration of the promotion quota provision of the Decree. Instead, it merely provided that the quota requirement was to remain in effect indefinitely until "the Court shall determine that the defendants have complied in good faith with this Order and the requirements of federal laws relating to employment practices."

In February of 1982, James A. Harrell and James B. Dean, Jr., white deputies employed by the Sheriff's Department, filed a motion to intervene as parties plaintiff, individually and as representatives of other white deputies. The Intervenors (Petitioners herein) had not previously participated in any aspect of the litigation. They asserted that the continued implementation of the promotion quota of the Consent Decree foreclosed their competition for available positions on an equal basis with other eligible deputies, and constituted a violation of their rights under the Fourteenth Amendment to the United States

Constitution and under 42 U.S.C. §§ 1981 and 1983. Petitioners neither sought retrospective relief nor collaterally attacked the initial legality of the Decree. They sought merely prospective relief in the form of dissolution of the mandatory promotion quota pursuant to the terms of the Decree itself.

After being permitted to intervene in the action, Petitioners filed a motion for dissolution or modification of the promotion quota provision. On December 9, 1983, after an earlier evidentiary hearing, the District Court entered an order dissolving the promotion quota, finding as a fact that the Defendants had complied in good faith with the provisions of the Consent Decree and the requirements of federal law.

On appeal, a panel of the Eleventh Circuit reversed. Reeves v. Wilkes, 754 F.2d 965 (11th Cir. 1985) (Reeves I). Declining to reach the merits of the Order of December 9, 1983, the panel instead held that the District

Court abused its discretion in permitting intervention in the first place.

On remand, Respondent Reeves moved for an award of attorney's fees against Petitioners. The District Court denied the motion, finding that the Petitioners, for purposes of 42 U.S.C. § 1988, were plaintiffs who had raised nonfrivolous claims. Respondent Reeves appealed from this decision.

The Eleventh Circuit panel in Reeves v. Harrell, 791 F.2d 1481 (11th Cir. 1986) (Reeves II) reversed the District Court as to Petitioners. That panel found that Petitioners' motion to intervene was frivolous and therefore § 1988 attorney's fees could be awarded against them. Petitioners' subsequent motion for rehearing was also denied.

ARGUMENT FOR GRANTING THE WRIT

The general proposition governing the award of attorney's fees pursuant to 42 U.S.C. § 1988 (hereinafter "§ 1988"), and the position accepted by the Eleventh Circuit in Reeves II, is that a plaintiff asserting a violation of

his own constitutional rights will have attorney's fees assessed against him only when his claim is frivolous, unreasonable, or altogether without foundation. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). Since the Eleventh Circuit in Reeves II correctly ruled that the Petitioners herein should be characterized as plaintiffs, attorney's fees should only be assessed against them if their intervention efforts were totally without foundation under the law available to them at the time their Motion to Intervene was filed in the District Court.

The Eleventh Circuit's decision in Reeves II to overrule the District Court by assessing attorney's fees against Petitioners was based on the majority's characterization of Petitioners' intervention motion as "frivolous" because of the "long delay between the entry of the consent decree and the motion to intervene[,] and the decision by a panel of

this court [Reeves I] that the intervenors failed to satisfy even one prong of the four prong [Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977)] test." Reeves II, 791 F.2d at 1485. The Eleventh Circuit's decision in Reeves I represented a sharp departure from the guidelines set forth in Stallworth, and this departure could not reasonably have been foreseen by Petitioners with the case law available to them at the time they filed their intervention motion. The court's analysis in Reeves I relied heavily upon United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983), which had not even been decided at the time Petitioners filed their intervention motion in February, 1982. To make the determination that Petitioners' intervention was frivolous on the ex post facto application of case law and knowledge gained in hindsight from the fact that intervention was not allowed by the court in Reeves I is clearly erroneous. See White v. South Parks Independent School District, 693 F.2d 1163 (5th Cir.

1982). Given the case law available to Petitioners at the time the intervention motion was filed, they "could reasonably have concluded . . . that their claim to intervention enjoyed a sufficient probability of success before the district court and [the Eleventh Circuit] to have elevated it above frivolousness." Reeves II, 791 F.2d at 1485 (Hill, J., dissenting).

Petitioners through their motion to intervene asserted a good-faith constitutional claim, and the Eleventh Circuit's award of attorney's fees against them runs counter to the established policy of 42 U.S.C. § 1988 of encouraging "private attorneys general" by compelling these Petitioners as legitimate civil rights claimants to pay the opposition's expenses. In characterizing Petitioners' actions as frivolous, the Eleventh Circuit has unprecedentedly employed the 'good faith' rubric to undermine § 1988's original salutary intent of encouraging valid Civil rights claims by private litigants. The court in

Reeves II has thus imposed a substantial additional burden on civil rights claimants, which can result only in a tremendous chilling effect on the desire and ability of future victims of discrimination to vindicate their legitimate claims. At no time did the court in either Reeves I or Reeves II suggest that Petitioners' claims and the interests sought to be protected were so lacking in merit that they were groundless or vexatious. The Reeves II decision has penalized Petitioners for electing to pursue their rights by means of a procedural device, which they believed in good faith was designed to be the most judicially effecient means of resolving the conflict. This decision produces the anomalous result of branding Petitioners as frivolous litigants when the only court that has actually considered the merits of their claim (the district court) has ruled in their favor! Even the court in Reeves I recognized that Petitioners had a legitimate claim on the merits of their action: "While the interve-

nors' interest may not have been adequately represented by an existing party in the original litigation, the deputies could alternatively institute an independent lawsuit and assert the specific violations of their rights." Reeves I, at 971. Additionally, the dissent in Reeves II certainly voiced the belief that the Petitioners' claims were not frivolous. Thus, Reeves II, which punishes Petitioners for bringing a clearly valid claim that was, in their good-faith judgment, brought to the court's attention in the most judicially expedient manner available to them at the time, embodies a rule of law flatly inconsistent with the requirement that for an award of § 1988 attorney's fees, the "action must be meritless in the sense that it is groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14 (1980). See also Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

The standard established by Reeves II could scarcely be more at odds with the spirit

and intent of § 1988:

> Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. . . . Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes.

S. Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912 (citations omitted).

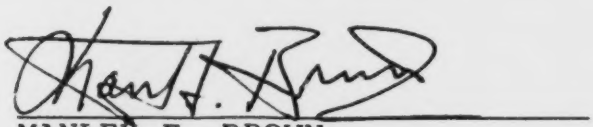
By employing this Code section to require Petitioners to pay counsel fees to Respondent Reeves, the Eleventh Circuit has frustrated the very policy that statute was enacted to implement. If allowed to stand, this decision will serve only to set at nought a major incentive for the vindication of unconstitutional discrimination by effectively closing the courthouse doors to many victims of such discrimination and reducing the Federal civil rights acts to an empty gesture.

CONCLUSION

For all the foregoing reasons, this

petition for a writ of certiorari should be granted.

Respectfully submitted,



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A P P E N D I X

JAMES REEVES, et al.,
Plaintiffs-Appellants,

v.

JAMES B. HARRELL, et al.,
Intervenors-Appellees,

v.

RAY WILKES, et al.,
Defendants-Appellees.

No. 85-8717.

United States Court of Appeals,
Eleventh Circuit

June 23, 1986.

Appeal from the United States District Court
for the Middle District of Georgia

Before HILL and CLARK, Circuit Judges,
and HENDERSON, Senior Circuit Judge.

HENDERSON, Senior Circuit Judge:

This appeal raises novel issues growing out of the efforts of a group of civil rights plaintiffs to secure an award of attorney's fees after their successful defense of a consent decree. After a careful review of the briefs, the record and the relevant case law, we conclude that the district court erred in denying the plaintiffs attorney's fees against the intervenors and therefore we affirm the

judgment in part and reverse and remand in part.

Factual Background

On March 24, 1978, black deputy sheriffs in the Bibb County Sheriff's Office filed a lawsuit in the United States District Court for the Middle District of Georgia alleging that they had been denied job assignments and promotions because of their race. The complaint, brought pursuant to 42 U.S.C. §§ 1981 and 1983, named the Bibb County Board of Commissioners and the Sheriff of Bibb County as defendants. On June 18, 1979, the parties entered into a consent decree which was incorporated into an order of the district court. The consent decree provided, among other things,(1) for the promotions of blacks within the Bibb County Sheriff's Office on a fifty percent (50%) basis with whites.

On February 17, 1982, two years and eight months after the consent decree was entered, two white deputy sheriffs filed a motion to intervene as plaintiffs in the action. They

alleged that, pursuant to the consent decree, the defendants adopted policies and practices which discriminated against the intervenors on the basis of race with respect to promotions. The original plaintiffs vigorously opposed the motion to intervene claiming that the motion was untimely and that the intervenors' substantive claims lacked merit. The Sheriff and the Board of Commissioners took no position as to the propriety of the intervention. They responded to the motion by stating that they had continuously complied with the consent decree and would continue to do so until ordered otherwise by the district court.

On April 28, 1982, the district court granted the motion to intervene. Subsequently, the intervenors filed a motion to dissolve or modify the consent decree. On December 9, 1983, the district court granted the intervenors' motion and dissolved the 50% quota requirement relating to promotions within the Sheriff's department. The plaintiffs appealed that decision to this court which reversed the

district court for the sole reason that the motion to intervene was not timely filed. Reeves v. Wilkes, 754 F.2d 965 (11th Cir. 1985).

The plaintiffs then filed an application for attorney's fees in the district court against both the intervenors and the defendants pursuant to the provisions of 42 U.S.C. 1988, which provides the following in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . ., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

On August 13, 1985, the district court entered an order denying the plaintiffs' motion for attorney's fees as to both the defendants and the intervenors. The court found that the defendants were not liable for attorneys' fees because they "played at most a neutral role in the intervention proceedings" and thus were not in an adversarial relationship with the plaintiffs. Record on Appeal, Vol, II, tab

216 at 7-8. The court further held that the intervenors were not responsible for attorneys' fees because the plaintiffs prevailed on a procedural point only and thus were not "prevailing parties" under 42 U.S.C. § 1988 an because the intervenors were "legitimate claimants" whose attempt to vindicate their rights was not frivolous or groundless. Id., at 5. The plaintiffs filed a timely appeal from the district court's judgment which can be overturned only upon a showing of an abuse of discretion. Fields v. City of Tarpon Springs, Fla., 721 F.2d 318, 321 (11th Cir. 1983).

Discussion

1. The Defendants

In Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court repeated the well established rule that "each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express, statutory authorization to the contrary." Id. at 429, 103 S.Ct. at 1937.

42 U.S.C. § 1988, the statute relied on by the plaintiffs, requires that a litigant must be a "prevailing party" before he is entitled to attorney's fees. In the present case, however, the plaintiffs did not "prevail" vis-a-vis the defendants because the defendants did not join in the motion to intervene nor did they express any position on the termination of the consent decree. The defendants simply remained neutral on all of the issues raised by the intervenor's complaint and notified the district court that they would continue to comply with the consent decree until otherwise instructed by the court.

The plaitiffs urge that the defendants were not neutral but instead "encouraged the white deputies to file a reverse discrimination complaint" thereby contributing "to the time and expense of plaintiff [sic] in protecting and vindicating the Consent Decree." Plaintiffs' brief at 13, 28. The evidence in the record relied on by the plaintiffs to support this proposition consists entirely of

two statements made to the media by representatives of the Sheriff's department. On October 23, 1981, before the filing of the intervenors' motion, Sheriff Wilkes stated in a Macon newspaper that "[w]e're hurting some men who have excellent records because of the consent decree." And, the same article quoted the Bibb County Personnel Director as saying that "[t]he one-on-one requirement has slowed the promotion process." These two out-of-court statements do not in any way establish that the defendants sided with the intervenors against the plaintiffs in light of the specific on-the-record statements made by the defendants that they took no position on any of the issues raised by the intervenors' complaint.

The plaintiffs also claim that they are entitled to attorney's fees against the defendants because the defendants did not join the plaintiffs in their efforts to dismiss the intervenors' complaint. This argument, however, presupposes an obligation on the part of

the defendants to defend the consent decree against third parties. The plaintiffs have failed to cite to any case law, statute, or policy reasons to support that proposition in a situation where third parties act independently of the original defendants. In view of the general rule which does not permit the grant of attorney's fees unless expressly provided otherwise by statute, see Hensley, supra 461 U.S. at 429, 103 S.Ct. at 1937, we hold that there is no basis in the present record upon which to award the plaintiffs attorney's fees against the defendants.

2. The Intervenors

The district court did not assess attorney's fees against the intervenors for two reasons. First, the court found that the intervenors should be characterized as plaintiffs and therefore could not be liable for attorney's fees because their claims were not frivolous or unreasonable. Second, the court found that the plaintiffs were not "prevailing parties" because they succeeded on only a

procedural matter. We conclude that the district court abused its discretion on both points and should have awarded reasonable attorney's fees to the plaintiffs.

Under 42 U.S.C. § 1988, a prevailing plaintiff in a civil rights action is generally entitled to attorney's fees unless special circumstances would render such a award unjust. Roadway Express, Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). A prevailing defendant, however, is ordinarily not entitled to attorney's fees unless the plaintiff's claims were frivolous or unreasonable so as to insure that plaintiffs will not be deterred from litigating good faith constitutiional claims. Hughes v. Rowe, 449 U.S. 5, 11, 101 S.Ct. 173, 177, 66 L.Ed.2d 163 (1980). In the present case, the intervenors claimed that the consent decree's quota provision violated their constitutional rights. Furthermore, it is undisputed that the intervenors were not responsible for any of the alleged violations that led

to the consent decree or that they had ever violated the constitutioinal rights of any of the members of the plaintiff class. Therefore, we agree with the district court that the intervenors should be characterized as plaintiffs and are liable for attorney's fees only if their claims were frivolous.

The motion to intervene was filed over two and a half years after the entry of the consent decree. Although the district court did not discuss timeliness in its order granting the motion to intervene, a panel of this court found that the district court abused its discretion by allowing the intervention after so long a delay. Reeves v. Wilkes, 754 F.2d 965 (11th Cir. 1985). In fact, the Reeves panel found that the intervenors failed to meet any part of the four-prong test for timely intervention laid out in Stallworth v. Monsanto, 558 F.2d 257 (5th Cir. 1977).(2) The Reeves opinion adequately articulates the reasons for the untimeliness of the intervenors' motion and there is no need to repeat

that discussion here.

The intervenors maintain that their claims were not frivolous because the district court ruled in their favor on the merits and because the Reeves panel did not overturn that decision but simply found the intervention untimely. This argument, however, misses the point. The intervenors chose to use intervention as the procedural mechanism to pursue their claims. This means, however, was clearly unavailable to them under existing case law. Therefore, the issue is not whether the intervenors' claims have merit, but whether their decision to pursue those claims by filing a motion to intervene was frivolous or unreasonable. Considering the long delay between the entry of the consent decree and the motion to intervene and the decision by a panel of this court that the intervenors failed to satisfy even one prong of the four prong Monsanto test, we agree with the plaintiffs that the intervenors' attempts to inject their claims into this litigation was frivo-

lous and makes them liable to the plaintiffs for reasonable attorney's fees.

The district court also held that the intervenors were not liable for attorney's fees because the plaintiffs prevailed solely on a procedural point. The court cited Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) to support its decision. The court's reliance on Hanrahan is misplaced. In Hanrahan, the plaintiffs were awarded attorney's fees after they secured a ruling from the Seventh Circuit Court of Appeals overturning a directed verdict and remanding the case for a new trial. The Supreme Court reversed the award of fees holding that Congress intended that such fees were available only after a party had prevailed "on the merits of at least some of his claims." Id. at 758, 100 S.Ct. at 1990. Because the relief obtained in Hanrahan was interlocutory in nature, the Supreme Court held that the plaintiffs were not prevailing parties for purposes of 42 U.S.C. § 1988.

In the present case, the intervenors

contend and the district court found, that the plaintiffs are not prevailing parties because the Reeves panel did not reach the merits of the intervenors' complaint but rather found for the plaintiffs for procedural reasons. This argument ignores the fact that the plaintiffs prevailed completely in this lawsuit. They successfully defended the consent decree and its quota provision. Unlike the situation in Hanrahan, where the plaintiffs still had to litigate the merits of their action before a jury, no further action is required by the plaintiffs to prevail here. Consequently, the plaintiffs completely prevailed in this litigation and are entitled to attorneys fees from the intervenors.

In summary, we find that the district court correctly determined the plaintiffs were not entitled to attorney's fees from the defendants. We conclude, however, that the court abused its discretion by disallowing fees from the intervenors. Accordingly, the case is remanded to the district court for a

determination of a reasonable fee award.

AFFIRMED in part and REVERSED and REMANDED in part.

HILL, Circuit Judge, dissenting:

I agree with the majority's conclusion that the intervenors in this action should be considered "plaintiffs" for the purposes of determining whether they should be held liable for attorney's fees. I must respectfully dissent, however, from the majority's judgment that the intervenors' claim to intervention in this case was frivolous. The majority frames the issue as I do, by asking "whether [the intervenors'] decision to pursue [their] claims by filing a motion to intervene was frivolous or unreasonable." Ante, at 1485. I cannot agree with the majority's conclusion, however, that the intervention they sought "was clearly unavailable to them under existing case law" because it was untimely. Id. In my view, intervenors could reasonably have concluded, on the basis of the case law available to them at the time, that their claim to

intervention enjoyed a sufficient probability of success before the district court and this court when it was filed to have elevated it above frivolousness.

The consent decree that is the subject of this litigation established, inter alia, mandatory racial quotas for hiring and promotion within the Bibb County Sheriff's Department, of which intervenors are white employees. See Reeves v. Wilkes, 754 F.2d 965, 967 (11th Cir. 1985). The hiring provisions of the decree stipulated that 50 percent of all entry level vacancies for deputy sheriff positions would be filled by black applicants until such time as 40 black deputies were employed. The promotion provisions similarly required that at least 50 percent of promotions made be given to blacks, but those provisions did not include a time limit on their operation or any numerical goal that would have to be achieved before they would no longer be effective. Instead, the decree simply provided that the promotions system it mandated would be fol-

lowed "until the court shall determine that the defendants have complied in good faith with this order and the requirements of federal laws relating to employment practices." Id. (quoting from the decree). The decree was approved by the district court on June 18. 1979.

In February of 1982, two years and eight months later, intervenors sought to intervene in the implementation of the decree for the very limited purpose of triggering the closure provision of that portion of the decree which governs promotions. As this court noted in reversing the district court's decision to allow the officers to intervene, "they did not made a collateral attack upon the legality of the decree, nor seek to review prior promotion decisions made under the decree." Id. at 968. Instead they simply contended "that 'good faith' had been established and that the remedial purpose sought to be accomlished by the provision had been served." Id.

The majority considers it significant

that this court, closely following United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983), found the intervenors to have failed to establish that their claim was timely filed. Those decisions, of course, were not available to intervenors when they decided to seek to intervene and, for that reason, are of limited unsefulness in determining whether that decision was frivolous or unreasonable in light of the case law available at the time. Moreover, to the extent that such decisions are relevant to our assessment of the reasonableness of intervenors' attempt to intervene, I would include among them our recent decision in Howard v. McLucas, 782 F.2d 956 (11th Cir. 1986), wherein we recognized the difficulties inherent in applying the standard test for determining timeliness of intervention to cases like this one and allowed a group of affected white and non-black employees to intervene to challenge the promotional provisions of a consent decree nearly ten years after suit had been filed.

See id. at 959-61.

The principal case on timeliness of intervention in similar suits that was available to intervenors when they decided to attempt to intervene was Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977). In that case, the former Fifth Circuit set forth the four factor test for determining timeliness of intervention that was later applied in Jefferson County, Reeves and Howard v. McLucas. Although Stallworth, in allowing intervention, informed potential intervenors who would seek to upset consent decrees of the factors that would be considered significant in determining whether such intervention was timely, it hardly foreclosed as untimely the claim made by intervenors in this case.

In particular, nothing in Stallworth required the court inReeves to apply the four factor timeliness test without regard to the limited nature of the intervention that was sought. The Reeves court applied the four factor test to require intervention even by

persons who are satisfied with a consent decree as drafted and approved as soon as practicable after it appears that they might someday perceive their interests to be adversely affected by the parties' failure to act in accordance with the terms of the decree. Where potential intervenors are satisfied with a decree, however, I would not require them to intervene immediately upon learning of the terms of the decree simply because they might someday be dissatisfied if the parties fail to enforce and abide by the terms of the decree. If potential intervenors are willing to confine their later intervention to a claim that is, in essence, a claim that their rights are being violated because the decree is not being implemented in accordance with its terms, requiring them to intervene as soon as they learn of the terms of the decree seems to suffer vices closely analogous to those the Stallworth court recognized when considering whether the institution of suit should be the critical event in determinig timeliness of

intervention:

> [A] rule making knowledge of the pendency of the litigation the critical event would be unsound because it would induce both too much and too little intervention. It would encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is correspondingly high. Often the protective step of seeking intervention will later prove to have been unnecessary, and the result will be needless prejudice to the existing parties and the would-be intervenor if his motion is granted, and purposeless appeals if the motion is denied. In either event, scarce judicial resources would be squandered, and the litigation costs of the parties would be increased. Such a rule would also mean that many individuals who excusably failed to appreciate the significance of a suit at the time it was filed would be barred from intervening to protect their interests when its importance became apparent to them later on. These effects would be inconsistent with the important purposes of Rule 24: to foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation.

Stallworth, 558 F.2d at 264-65.

These are not frivolous concerns, nor was it unreasonable of the intervenors in this case to consider it quite possible that this

court would be motivated by such concerns to decide that the Stallworth test should not be applied as it was in Reeves, but instead should be applied with some sensitivity to the nature of the intervention sought. The resulting analysis still might have resulted in a denial of intervention as untimely, but the intervenors' claim surely would not look as "frivolous," in hindsight, as it perhaps does now when the opinion in Reeves is read without considering the possible significance of this difference between the facts of Reeves and the cases on which it relied. Although it is the law of this case that intervention should not have been allowed, I find the conclusion inescapable that intervenors' claim to intervention in this novel case was not frivolous because untimely, and that attorney's fees should not be assessed against them on that ground.

FOOTNOTES

(1) The other provisions of the consent decree are not relevant here.

(2) In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

JAMES REEVES, et al.,
Plaintiffs-Appellants,

v.

JAMES B. HARRELL, James B. Dean, Jr.,
and others,
Plaintiffs-Intervenors-Appellees,

v.

RAY WILKES, et al.,
Defendants-Appellees.

No. 84-8022.

United States Court of Appeals,
Eleventh Circuit

March 8, 1985.

Rehearing and Rehearing En Banc
Denied April 15, 1985.

Appeal from the United States District Court for the Middle District of Georgia.

Before HENDERSON and HATCHETT, Circuit Judges, and NICHOLS*, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this employment discrimination case we must determine whether the district court erred in allowing intervention several years after entry of a consent decree and implementation of a remedial plan. Finding error, we reverse.

On March 24, 1978, James Reeves, a black

male employed as a deputy sheriff in the Bibb County Sheriff's Department, commenced this litigation. On behalf of himself and all black deputy sheriffs then employed by the Bibb County Sheriff's Department and a class composed of all past, present, and future black applicants for employment, Reeves alleged racially discriminatory practices in hiring, job assignments, and promotions within the sheriff' department. The lawsuit named Sheriff Wilkes, but did not name deputies or allege that white deputies participated in or were responsible for any of the acts of discrimination.

During litigation, the parties voluntarily negotiated and entered into a "Stipulation for Settlement," which included a proposed "Consent Decree" to resolve all issues raised in the complaint. On May 24, 1979, the district court provisionally approved the stipulation and consent decree and scheduled a hearing on the fairness and reasonableness of the proposed settlement. On June 18, 1979, the dis-

trict court approved the consent decree and entered a formal order. White deputies did not participate in the June 18 hearing; they were not given formal notice of the hearing or copies of the consent decree.

Among other things, the consent decree established certain mandatory racial quotas for hiring and promotion within the Bibb County Sheriff's Department. For hiring, the decree required that 50 percent of all entry level vacancies for deputy sheriff positions by filled by black applicants until such time as 40 black deputies were employed. Equal promotion policies were required, but unlike the hiring provision, the promotion section of the consent decree established no time limit or numerical cutoff goal for the period of its operation. The promotion provision, part VIII, paragraph 12, which is central to this lawsuit, provides:

> PART VIII--AFFIRMATIVE ACTION--PROMOTIONAL GOALS
>
> 12. A part of the objective of this order is to achieve a work force in which

> the promotion of black employees, is equal, (a) by job classification, (b) by department, and (c) by rate of pay. In furtherance of this promotion goal, during the term of this order, defendants shall adopt the promotion goals referred to below:
>
> a. All personnel in the sheriff's department will be made aware of the requirements for promotion to their next highest position.
>
> b. At least semi-annually personnel eligible for promotion will be notified.
>
> c. Each year at least fifty percent (50%) of the promotions will be blacks who have met the requirements for promotion to their next highest position.
>
> d. This system is to be followed until the court shall determine that the defendants have complied in good faith with this order and the requirements of federal laws relating to employment practices.(1)

Pursuant to the decree, the Sheriff was required to file with the court, under seal, detailed periodic reports on the hiring, promotion, and transfer activities within the department. The decree also gave the district court continuing jurisdiction over the case for enforcement purposes and gave defendants the right to move for dissolution of the decree upon a showing of good faith compliance.

On February 17, 1982, James A. Harrell and James B. Dean, Jr., white deputies, filed a motion to intervene in this litigation as party plaintiffs. Harrell and Dean sought intervention requesting that the court discontinue the promotion provisions. They alleged that the promotion quota provision was discriminating against them and adversely impacting their rights and interests and those of other white deputies under the Fourteenth Amendment to the United States Constitution and 42 U.S. C.A. §§ 1981 and 1983 (West 1981). They did n make a collateral attack upon the legality of the decree, nor seek to review prior promotion decisions made under the decree. The court granted intervention. Subsequently, on June 15, 1983, the intervenors filed their motion to dissolve or modify the promotion provision of the consent decree, contending that "good faith" had been established and that the remedial purpose sought to be accomplished by the provision had been served.

On August 9, 1983, the district court

held an evidentiary hearing on the intervenors' motion. On December 9, 1983, the district court granted the intervenors' motion and dissolved the promotion provision, part VII, paragraph 12. The only issue we address is whether the district court erred in granting the motion to intervene.

Discussion

Reeves contends that the motion to intervene was untimely. Leave for permissive intervention is governed by Fed.R.Civ.P. 24(b) which provides:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question or law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [Emphasis added.]

The question whether an application for intervention is timely is largely committed to the district court's discretion, and its determination will not be overturned on appeal absent an abuse of discretion. NAACP V. New York, 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973); United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983).

The standards for analyzing the timeliness of an application for intervention are set forth in Stallworth v. Monsanto, 558 F.2d 257 (5th Cir. 1977). In Stallworth, nonunion white employees sought intervention in a civil rights case instituted by black employees claiming that remedial provisions of a consent order entered by a district court unnecessarily deprived white employees of their seniority rights. On appeal, the appellate court reversed the district court's order denying intervention as untimely. The four factors considered in assessing timeliness included: (1) the length of time during which the intervenor actually know or reasonably should have

known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would be intervenor may suffer if his petition for leave to intervene is denied; (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. Stallworth, 558 F.2d 257.

Recently, in United States v. Jefferson Co., 720 F.2d 1511 (11th Cir. 1983), we again addressed the issue of timeliness of intervention to curtail the application of a consent decree. Applying the Stallworth test, we held that the district court properly denied the motion to intervene as untimely. In Jefferson Co., consent decrees incorporated affirmative action remedies in hiring and promotion

policies of the City of Birmingham, Alabama. Seven white members of the Birmingham Firefighters Association (BFA) moved to intervene; the district court denied their motion as untimely. Similarly, in this case, for reasons discussed below, we find Harrell and Dean's motion to intervene untimely.

Factor 1

Harrell and Dean contend that their motion was timely beacuse they filed it as soon as they discovered that they might be adversely affected by the continued compliance with the consent decree. The intervenors argue that they did not appreciate the potential adverse impact of the consent decree at its inception, nor were they provided notice of the decree's implementation or terms. The intervenors insist that they do not seek to undo the previous accomplishments attained under the decree or to substantially alter its application as a whole. Rather, they contend that the indefinite duration of the promotion provisions has or will continue to unfairly

affect their interests.

The first factor of the Stallworth test focuses on what the would be intervenor actually knew or reasonably should have known regarding his interest in the case before the petitioned for leave to intervene. The record reveals that throughout the pendency of Reeves's suit, two local newspapers, The Macon Telegraph and The Macon News, provided continuous coverage of the case's development. The articles reported the case as a class action challenging race discrimination in hirings and promotions.(2) On June 19, 1979, the day after the consent decree had been inplemented, The Macon Telegraph printed an article, "Bibb Sheriff's Department Plan OK'd," which generally discussed the decree's intent in certain provisions. Specifically, the article stated, "the proposal about to become law calls for the hiring of one black for every white until the department has a total of 40 black employees. . . . The one-to-one ration also applies to promotions and assignments to road duty.

The promotion system will be in effect indefinitely." Despite the local news coverage of the case, Harrell and Dean expressed no recollection of ever reading the local newspaper articles. Yet, they readily admit that they pay particularly close attention to issues involving the sheriff's department. Dean stated that it was not until several months after the consent order had been entered that he realized Reeves's suit did not deal with Reeves's attempt to recover the use of a patrol car;(3) he then obtained a copy of the decree.

Subsequently, on October 23, 1981, The Macon News printed an article, "Wilkes: Deputies Hurt by Settlement," in which Sheriff Wilkes admitted that deputies are being hurt by the department's 1979 racial desegregation settlement. Wilkes was quoted as saying, "We're hurting some men who have excellent records." Also, the article quoted Leo Wright, Bibb County personnel director, as saying, "The one-on-one requirement has slowed

the promotions process."

Nevertheless, it was not until February 17, 1982, two years and eight months after entry of the consent decree, that Harrell and Dean filed their motion to intervene. We strain to understand how two deputies informed about current events affecting the sheriff's office would not have foreseen potential relevance of the decree's promotional provisions to their interests before two years and eight months had passed. We, of course, recognize that when the intervenors first became aware of the pendency of the case is not alone dispositive of the timeliness issue. In this case, however, numerous articles appeared in the local newspaper discussing the decree's intent in terms of hiring and promotional provisions. Also, the intervenors recalled some general discussion among fellow deputies about Reeves's suit. Similarly, the firefighters in Jefferson County recognized at an early stage in the proceedings that the suit may adversely affect them as evidenced by

conversations regarding the City's strategy in defending the action. Yet, they failed to seek intervention; rather, the firefighters made an apparently ill-advised decision to rely on others to advance their interests.

Additionally, Harrell and Dean claim to have been adversely affected by enforcement of the consent decree's promotional provision; yet, the record reflects that Harrell did not apply for promotion between issuance of the consent decree and the filing of the motion for intervention. Dean was denied a promotion in 1980 because of lack of experience; all of the five black officers promoted at that time had been with the sheriff's office longer than Dean. We mention this although the first factor of the Stallworth test only requires an examination of what the intervenors actually knew or reasonably should have known regarding his interest in the case. While the intervenors may not have been provided formal notice of the decree's formulation or content, informed members of the community had ample

opportunity to be apprised of the substance of Reeves's action. Consequently, the district court incorrectly applied the first factor in determining that the intervenors acted timely.

Furthermore, the intervenors were dilatory in filing their motion for dissolution or modification of the consent decree. Following the district court's granting of the motion to intervene on April 28, 1982, the intervenors filed a complaint on May 7, 1982. Subsequently, the defendants filed answers to the complaint on May 26, 1982, and June 21, 1982; one year later, on June 15, 1983, intervenors filed their motion for dissolution or modification of the consent decree. Throughout their involvement in this case, the intervenors have procrastinated and delayed in asserting their interests.

Factor 2

Under the second factor of the timeliness test, the district court is required to consider the extent of the prejudice that the existing parties to the litigation may suffer as a

result of the intervenors' failure to apply for intervention as soon as they actually knew or reasonably should have known of their interest in the case. Stallworth, 558 F.2d at 265. Several months after the decree had been issued, the intervenors began to suspect a potential adverse effect. Articles appearing in the local newspapers between the date of the decree's inception and the filing date of the motion to intervene described the decree's provisions and effect on the department.

In this case, if intervention is allowed, time and effort expended in formulating the settlement to remedy past discrimination will be for naught. The decree's remedial plan was designed to be enforced over time; compliance with the decree is monitored by the district court. Likewise, in Jefferson County, the court found that to allow intervention after two trials and a long complex negotiation process would have prejudiced the existing parties. The firefighters knew of their interest prior to the first trial.

Pursuant to the promotion provision, the intervenors argue that the defendants' good faith compliance allowed the district court to dissolve the provision. The intervenors assert that the sheriff's department has demonstrated good faith compliance by promoting eight qualified black and eight qualified white deputies between July, 1979, and April, 1983. Yet, the process contemplated is incomplete because the positions of major and captain have not been proportionally promoted; no blacks have reached these promotional levels or positions.(4) This fact alone is insufficient to demand that the provision be terminated. Dissolution of the promotion clause now would frustrate the decree's intent. The district court misapplied the Stallworth test in analyzing the second consideration.

Factor 3

The third factor of the test required the court to determine whether the intervenors would be prejudiced if denied intervention. "Where the movant has no identity of interest

with a party and thus could not be bound, or where his interest is identical with the party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor." Jefferson County, 720 F.2d at 1517. By definition, a consent decree only binds those who consent, either expressly or impliedly. Jefferson County, 720 F.2d at 1518 n. 19. While the intervenors' interest may not have been adequately represented by an existing party in the original litigation, the deputies could alternatively institute an independent lawsuit and assert the specific violations of their rights. "The consent decree would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree." Jefferson County, 720 F.2d at 1518. "We do not preclude an action having a burden, financial or otherwise, on a consent decree as an 'impermissible collateral attack' to the extent that it deprives a non-party of his day in court to assert the violation of

his civil rights." Jefferson County, 720 F.2d at 1518. "The burdens of cost and delay the would be intervenor would suffer if required to bring a future lawsuit do not constitute prejudice under the third Stallworth factor. He would have those burdens at any time he sought to enforce his rights in court." Jefferson County, 720 F.2d at 1517 n.13. Furthermore, the promotion provision in this case provides that "anything herein notwithstanding, defendants shall not be required to Violate Title VII or any other laws mandating equal employment opportunity in the implementation of this section of the decree." Consequently, because we find that the intervenors were not prejudiced, the district court was not justified in allowing intervention.

Factor 4

Finally, under the fourth timeliness factor, the intervenors have advanced no compelling unique justification mandating a determination that the application was timely.

Considering the four-part test articu-

lated in Stallworth, and again in Jefferson County, we find that the district court misapplied the criteria in allowing intervention and thus, abused his discretion. Because intervention was improperly granted, we decline to address other issued. Accordingly, we reverse the decision of the district court.

REVERSED

FOOTNOTES

* Honorable Philip Nichols, Jr., U.S. Circuit Judge for the Federal Circuit, sitting by designation.

(1) The promotion provision further provides:

> 13. At the time the person or commission makes a promotion decision to fill a vacancy, he and/or they shall make a written record of every person considered and shall state why the vacancy was not awarded or was awarded to each such person considered. The original of that report shall be kept in the Personnel Office.
>
> 14. Anything herein notwithstanding, Defendants shall not be required to violate Title VII or any other laws mandating equal employment opportunity in the implementation of this section of the Decree.

(2) Publication of local newspaper articles included:

1. "Sheriff Denies Racial Bias," The Macon Telegraph, June 7, 1978.
2. "Class Suit Certified by Judge," The Macon Telegraph, November 18, 1978.
3. "Sheriff Defends Tests," The Macon Telegraph, November ____, 1978.
4. "Bibb Sheriff Hiring Tests Challenged," The Macon Telegraph, November 19, 1978.
5. "Owens Wants to Speed Sheriff's Test Hearing," The Macon Telegraph, December 6, 1978.
6. "County Sheriff Won't End Tests," The Macon Telegraph, December 7, 1978.
7. "The Hiring Exam is Unfair, Expert Says," The Macon Telegraph, December 7, 1978.
8. "Judge Questions Testing Schedule," The Macon News, January 9, 1979.

9. "Bibb Sheriff Must Halt Test Program," The Macon Telegraph, January 10, 1979.

10. "Court Orders Testing Halt," The Macon News, January 10, 1979.

11. "Jim Reeves: 'I'll Compete Against Anyone,'" The Macon Telegraph, January 16, 1979.

12. "Sheriff's Testing Talks Broken Down--Lawyer," The Macon News, March 22, 1979.

13. "Sheriff, Deputy Reach Agreement in Hiring Bias Suit," The Macon News, May 25, 1979.

14. "Bibb Sheriff Hiring Plan Agreed On," The Macon Telegraph, June 19, 1979.

15. "Bibb Sheriff's Department Plan OK'd," The Macon Telegraph, June 19, 1979.

16. "Wilkes: Deputies Hurt by Settlement," The Macon News, October 23, 1981.

(3) Testimony from Dean's deposition:

> Q: I'm trying to find out . . . when you discovered through conversation that James Reeves didn't file a suit so he could get a car.
> A: It was some time, you know, after that--I'm sure--after the order was filed that--like I say, I can't pinpoint the time period. . . . As soon as I was aware of what was happening or what had happened--that's when I felt like that I needed to pursue it since it would affect me.

(4) Reeves, however, may have conceded some good faith compliance with the decree because he was qualified for captain on March 29, 1983; he was denied promotion because of a previous disciplinary action; and yet, he did not challenge the department's failure to promote him until the intervenors sough to dissolve the promotional provision on June 15, 1983.

JAMES REEVES, et al.,
Plaintiffs-Appellants,

v.

JAMES B. HARRELL, et al.,
Intervenors-Appellees,

v.

RAY WILKES, et al.,
Defendants-Appellees.

No. 85-8717.

United States Court of Appeals,
Eleventh Circuit

June 23, 1986.

Appeal from the United States District Court
for the Middle District of Georgia

Before HILL and CLARK, Circuit Judges, and
HENDERSON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED in part and REVERSED; and that this cause be

and the same is hereby, REMANDED in part to said District Court for a determination of reasonable attorney's fees;

It is further ordered that costs be taxed equally against plaintiffs-appellants, intervenors-appellees and defendants-appellees, to be taxed by the Clerk of this Court.

HILL, Circuit Judge, dissented and filed an opinion.

Entered: June 23, 1986

For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: AUG 15 1986

JAMES REEVES, et al.,
Plaintiffs-Appellants,

v.

JAMES B. HARRELL, et al.,
Intervenors-Appellees,

v.

RAY WILKES, et al.,
Defendants-Appellees.

No. 85-8717.

United States Court of Appeals,
Eleventh Circuit

June 23, 1986.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion June 23, 1986, 11 Cir., 1986, ____ F.2d ____)
(August 7, 1987) [sic]

Before HILL and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the

suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

CERTIFICATE OF SERVICE

I, Manley F. Brown, a member of the Bar of the Supreme Court of the United States and counsel of record for Petitioners herein, hereby certify that on the 4th day of November, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On James Reeves, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. Robert E. Steele, Jr.
Ms. M. Linda Mabry
614 Fulton Federal Building
Macon, Georgia 31201

This being the above-named Respondents' counsel of record.

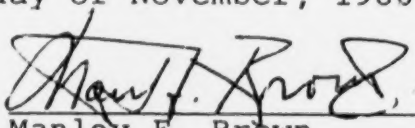
On Ray Wilkes, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. O. Hale Almand, Jr.
Sell & Melton
Post Office Box 229
Macon, Georgia 31297

This being the above-named Respondents' counsel of record.

All parties required to be served have been served.

This 4th day of November, 1986.



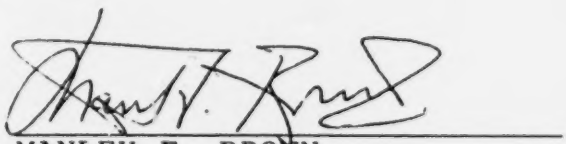
Manley F. Brown

O'NEAL, BROWN & SIZEMORE, P.C.
1001 Fulton Federal Building
Macon, Georgia 31201
(912) 742-8981

State of Georgia

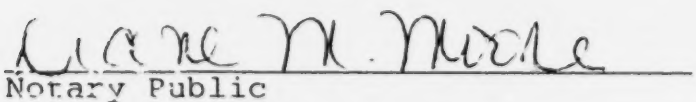
County of Bibb

I, Manley F. Brown, depose and say that I am the attorney of record for the Petitioners herein, and that on November 4, 1986, pursuant to Rule 28, Rules of the Supreme Court, I placed in the United States mail, with adequate first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, forty (40) copies of the foregoing Petition for Writ of Certiorari. To my knowledge this mailing took place within the time permitted by law for the filing of said Petition.



MANLEY F. BROWN

SWORN TO AND SUBSCRIBED before me this 4th day of November, 1986.

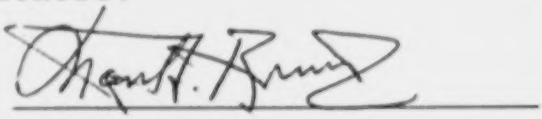


Notary Public

My Commission Expires March 6, 1990

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Petitioners:



Manley F. Brown
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The Clerk is requested to notify counsel of action of the Court by means of regular mail.

In this case the person to be notified for Petitioners is:

Manley F. Brown
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Macon, Georgia 31201

FILED
NOV. 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-742

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES A. HARRELL, ET AL.,
PETITIONERS

VS.

JAMES REEVES, ET AL.,
RESPONDENTS

VS.

RAY WILKES, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JAMES REEVES, ET AL., Plaintiffs	)	
v.	)	
JAMES A. HARRELL, JAMES B. DEAN, JR., and others, Intervenors	)	CIVIL ACTION NO. 78-61-MAC
v.	)	
RAY WILKES, et al., Defendants	)	

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION TO SET AWARD OF ATTORNEY'S FEES AND COSTS

In the case above identified the Plaintiffs, a class of black Deputy Sheriffs employed by the Bibb County Sheriff's Department, have filed a "motion to set award of attorney's fees and costs" seeking an award of attorney's fees and costs against the Defendants and against a group of white Deputy Sheriffs who were permitted to intervene as parties Plaintiff in this employment discrimination action to assert claims concerning the continued operation of a racial quota governing promotions in the Sheriff's Department. Briefs have been

submitted by counsel for the Plaintiffs, counsel for the Defendants, and by counsel for the Intervenors, and upon consideration, the Court determines that the Plaintiffs have no basis for the recovery of attorney's fees in any amount from the Defendants or from the Intervenors, and have also waived any entitlement to recover any items of cost by failing to file a timely bill of costs.

In 1979 this Court entered a Consent Decree as part of a settlement of this case between Plaintiffs and the Defendants, Sheriff Ray Wilkes and the members of the Bibb County Civil Service Board, hereinafter referred to as Defendants. Among other things, the Consent Decree imposed mandatory racial quotas regarding hiring, job assignments and promotions within the Sheriff's Department. After entry of the Consent Decree the Plaintiffs sought and were awarded attorney's fees and costs from the Defendants.

White employees of the Sheriff's Department were neither named as parties to the

Plaintiffs' suit nor were they alleged to have engaged in any discriminatory conduct against the Plaintiffs. In February, 1982, James A. Harrell and James B. Dean, Jr., white Deputy Sheriffs employed by the Sheriff's Department, filed a motion to intervene as party Plaintiffs individually and as representatives of other white Deputy Sheriffs. Mr. Harrell and Mr. Dean and other white deputies subsequently joined as Plaintiffs by the Court are hereinafter referred to as the Intervenors. The Intervenors asserted that the Sheriff's Department was violating their rights under the Fourteenth Amendment to the United States Constitution and under 42 U.S.C. §§ 1981 and 1983 by reason of the existence and continued implementation of the Consent Decree's racial quota governing promotions within the Sheriff's Department. They alleged that the promotions quota foreclosed their competing for available positions on an equl basis with other eligible deputies. The Intervenors neither sought retrospective relief in the form of preferential

treatment or the reversal of promotions awarded to minorities under the Consent Decree, nor did they collaterally attack the initial legality of the Consent Decree and its provisions. The Intervenors sought only prospective relief in the form of dissolution of the mandatory promotion quota.

In due course the Intervenors filed a motion for dissolution of the promotion quota provision of the Consent Decree. The grounds for the dissolution of the promotion quota were that the Consent Decree's criterion for termination of the promotion quota had been satisfied and that continuation of the promotion quota would have an unlawful impact on the Intervenors.

After an evidentiary hearing the Court entered an order dissolving the promotion quota provision, finding as a fact that the Defendants had demonstrated the requisite good faith compliance with the provisions of the Consent Decree and the mndates of federal law. Plaintiffs appealed to the Court of Appeals for the

Eleventh Circuit asserting that the motion to intervene should have been denied as untimely and attacking the merits of the Court's decision dissolving the promotion quota provision. The Court of Appeals held that the motion to intervene was untimely, but did not reach the merits of continued implementation of the promotion quota provisions. In fact, the Court of Appeals expressly stated in its opinion that the white deputies "could alternatively institute an independent lawsuit and assert the specific violations of their rights". Reeves v. Wilkes, 754 F2d 965, at 971 (11 Cir. 1985). The Court of Appeals did not award attorney's fees to the Plaintiffs and the Plaintiffs did not submit a bill of costs as required by Rule 39 of the Federal Rules of Appellate Procedure.

In their motion for an award of attorney's fees the Plaintiffs apparently rely on 42 U.S.C. § 1988, which provides in pertinent part that "In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985 and 1986 .

prevailing party . . . a reasonable attorney's fee as part of the cost." (Emphasis added.)

The Intervenors are fellow employees of the Plaintiffs and were never alleged by the Plaintiffs to have discriminated against the Plaintiffs or to have controlled employment decisions made with respect to the Plaintiffs. Further, the Intervenors proposed no action to obstruct or overturn past employment decisions under the Consent Decree. They only sought to invoke the termination provision that the original parties included in the Consent Decree itself. The Intervenors were aligned as Plaintiffs in the case because they asserted a constitutional claim in good faith and prevailed in this Court on the merits of that claim. Because they did not discriminate against the Plaintiffs and in fact did no more that assert their own claims, the Inervenors cannot be compelled to pay the Plaintiffs' attorney's fees. An award of attorney's fees against the Intervenors would undermine the policy of § 1988

of encouraging "private Attorneys General" by posing a risk that legitimate claimants in a case would be ordered to pay the attorney's fees incurred by others in the proceeding.

Even if the Intervenors should have been considered adverse to the Plaintiffs, a party may recover attorney's fees against a plaintiff pursuant to 42 U.S.C. § 1988 only where the claim brought is frivolous, unreasonable or groundless . . . , a requirement that cannot be met in this case because the merits of the Intervenors' claims are clearly not frivolous, unreasonable or groundless. The fact that this Court ruled in favor of the Intervenors on the merits of their claims precludes any characterization of such claims as frivolous, unreasonable or groundless, and it is noted that the Court of Appeals in its opinion expressly stated that the Intervenors could renew their claims in an independent action in this Court. See Kirkland v. New York State Department of Correctional Service, 524 F. Supp. 1214 (S.D.N.Y., 1981).

The Plaintiffs cannot claim status as a "prevailing party" in this case so as to make them eligible for an award of attorney's fees under 42 U.S.C. § 1988 because they have not prevailed on the merits. They have only prevailed on their contention that the intervention was not timely filed, which is a procedural point. Hanrahan v. Hampton, 446 U.S. 754 (1980).

With regard to the Plaintiffs' claim for an award of attorney's fees against the Defendants, there is even less basis for such an award. When the Intervenors filed their motion to intervene the Defendants Ray Wilkes and members of the Bibb County Civil Service Board neither opposed or supported the motion. They responded to the motion by replying that they had in good faith complied with the provisions of the Consent Decree ever since its entry. They also reported the progress made toward reaching certain of the goals set out in the Consent Decree nd they emphasized that they would make every effort "to fully comply with

all provisions of said decree unless directed otherwise by the District Court".

The District Court permitted the filing of the intervention and the Defendants then answered stating that they had not deprived the Intervenors of any rights guaranteed to them by the laws and Constitution of the United States. They again asserted that they had in good faith complied with the provisions of the Consent Decree and that they would continue in good faith to implement the Decree's provisions "unless restrained or enjoined by this Court".

When the Intervenors filed their motion to dissolve or modify the promotion provision of the Consent Decree the Defendants again reiterated that "unless otherwise ordered by this Court, [Defendants] will continue in good faith to implement the provisions of the Consent Decree". The Defendants further stated that if the Court granted the Intervenors' motion the Defendants would "continue to comply in good faith with the requirements of the United States Constitution and federal law". Thereaf-

ter when this Court later granted the Intervenors' motion and dissolved the promotion provision of the Consent Decree the Court noted that the Defendants had adopted essentially a neutral position with respect to the relief sought by the Intervenors, and further, that the Defendants had demonstrated good faith compliance with the law and with the terms of the Consent Decree and the Court went further and recited the factual basis for the Court's determination.

The Defendants played at most a neutral role in the intervention proceedings and in the subsequent motion of the Intervenors to dissolve or modify the Consent Decree. They neither contested nor supported the intervention and throughout the proceedings on the intervention question and on the subsequent motion to dissolve and modify the Defendants steadfastly abided by the Consent Decree and repeatedly announced their intention to continue to do so unless enjoined. Thus, if anything, they supported the Consent Decree despite the efforts

of the Intervenors to modify or dissolve it.

The Court notes that the Plaintiffs in their motion assert that "Defendant Sheriff encouraged the Intervenors and refused to contest their intervention". There is nothing in the record in this case to support this assertion. As has been above noted, the Defendants consistently maintained the policy of neutrality with regard to the intervention motion and in the meantime have complied in all respects with the Consent Decree. The Defendants were simply not a party to the intervention dispute and the dispute about modification of the Consent Decree. Certainly the Plaintiffs cannot be regarded as a "prevailing party" as regards the Defendants. After the Plaintiffs and the Defendants entered into the Consent Decree in 1979 the Plaintiffs sought and obtained an award of attorney's fees against the Defendants, however, in that situation the Plaitiffs were the prevailing party and the award of attorney's fees was proper. In this case it is not.

The Court also notes that the Plaintiffs assert that the Defendants have acted in bad faith and for this reason should be subject to an attorney's fee award. There is no basis in the record for this contention. As has already been noted, the Defendants have conscientiously complied with the Consent Decree and they have consistently announced their intention to continue to do so until ordered to do otherwise by the Court, and the District Court specifically found that the Defendants had complied with the Consent Decree in good faith.

In summary, the Court concludes that the motion of the Plaintiffs to set an award of attorney's fees and costs against the Intervenors and the Defendants would not be justified in this case and should be and is hereby denied for the reasons above set out.

ENTERED this 13th day of August, 1985.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Manley F. Brown, a member of the Bar of the Supreme Court of the United States and counsel of record for Petitioners herein, hereby certify that on the 14th day of November, 1986, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Supplemental Appendix to Petition for Writ of Certiorari on each of the parties herein, as follows:

On James Reeves, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. Robert E. Steele, Jr.
Ms. M. Linda Mabry
614 Fulton Federal Building
Macon, Georgia 31201

This being the above-named Respondents' counsel of record.

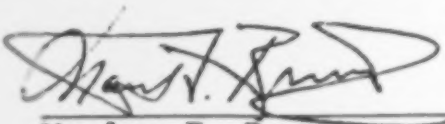
On Ray Wilkes, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. O. Hale Almand, Jr.
Sell & Melton
Post Office Box 229
Macon, Georgia 31297

This being the above-named Respondents' counsel of record.

All parties required to be served have been served.

This 14th day of November, 1986.



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Supreme Court, U.S.
FILED
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CLERK

NO. 86-742

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES A. HARRELL, ET AL.,
PETITIONERS

VS.

JAMES REEVES, ET AL.,
RESPONDENTS

VS.

RAY WILKES, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CICRUIT

RESPONDENT REEVES BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Robert E. Steele, Jr.
M. Linda Mabry
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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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STATEMENT OF FACTS

On March 24, 1978, James Reeves, a black deputy sheriff employed by the Sheriff's Office of Bibb County, filed a complaint under 42 U.S.C. §§ 1981, 1983, and 42 U.S.C. § 2000e, et seq., alleging that the Sheriff of Bibb County and others were discriminating against blacks in hiring policies, testing, promotion, testing and job assignment. On the date this complaint was filed no black had ever received a promotion above the rank of patrolman.

On May 24, 1979, after extensive discovery and two hearings, a "Stipulation for Settlement" incorporating a proposed Consent Decree was proposed to and thereafter approved by District Court on June 18, 1979, after a fairness hearing.

The operative sections of the Consent Decree are as follows:

> "Part VIII - Affirmative Action-Promotion Goals.
>
> 12. A part of the objective of this Order is to achieve a workforce in which the

promotion of black employees, is equal (a) by job classification, (b) by department, and (c) by rate of pay. In furtherance of this promotion goal, during the term of this Order, defendants shall adopt the promotion goals referred to below:

A. All personnel in the Sheriff's Department will be made aware of requirements for promotion to their next highest position.

B. At least semi-annually, personnel eligible for promotion will be notified.

C. Each year at least fifty percent (50%) of the promotions will be blacks who have met the requirements for promotion to their next highest position.

D. This system is to be followed until the Court shall determine that the defendants have complied in good faith with this Order and the requirements of Federal Laws relating to employment practices."

On February 17, 1982, two years and eight months after the Consent Decree became operative James A. Harrell and James B. Dean, Jr., filed a motion to intervene.

Mr. Harrell did not apply for promotion from the date of the Consent Decree to the date the intervention was filed, although there were ten (10) promotions, and five (5) of them were awarded to white deputies who had requested promotion.

Mr. Dean applied for promotion in three (3) of the ten (10) promotions, the Sheriff denied him a promotion because of his "lack of experience". Five (5) white deputies who had the requisite "experience" were promoted. Five (5) black deputies were promoted, each had been with the Sheriff's Office longer than Dean.

Harrell and Dean sought intervention requesting that the Court discontinue the promotion provisions. They alleged that the promotion provision of the Consent Decree was discriminating against them and adversely impacting their rights and interest.

At the time of intervention it was clear the goals of the Consent Decree had not been met. No black had reached the promotional levels of Major or Captain.

On April 28, 1982, without a hearing intervention was approved.

On June 15, 1983, petitioners filed a motion to dissolve the promotion provision of the Consent Decree.

A hearing on the motion was held on August 9, 1983. The petitioners called no witnesses. The only evidence offered by petitioners was affidavits of the racial composition of the Sheriff's Department and the promotions since entry of the Consent Decree. Said evidence showed the goals of the Consent Decree had not been met.

On December 9, 1983, the District Court entered an Order dissolving the promotion provisions of the Consent Decree and Respondent black deputies appealed.

On appeal, the Eleventh Circuit reversed. Reeves v. Wilkes, 754 F. 2d 965 (11th Cir. 1985) (Reeves I). The panel found as a fact the Petitioners motion to intervene was not timely and dismissed the Petitioners. Respondent

black deputies defeated the intervention and derailed the attack on the Consent Decree.

On remand, Respondent black deputies moved for attorneys' fees against Petitioners pursuant to 42 U.S.C. § 1988. The District Court denied attorneys' fees and Respondent black deputies appealed.

The Eleventh Circuit in Reeves v. Harrell, 791 F. 2d 1481 (11th Cir. 1986)(Reeves II) reversed. The panel found: Respondent black deputies were prevailing parties under 42 U.S.C. § 1988; Petitioners should be characterized as plaintiffs in determining attorneys' fees under 42 U.S.C. § 1988. The standard of Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) was applied in assessing attorneys' fees and the Eleventh Circuit found Petitioners' motion to intervene was frivolous.

Petitioners filed a petition for Writ of Certiorati in this Court. The only issue raised is whether Petitioners' motion to intervene was frivolous.

The Eleventh Circuit in Reeves v. Harrell, 791 F. 2d 1481 (11th Cir. 1986) (Reeves II) found the Petitioners' motion to intervene to dissolve the Consent Decree filed two years and eight months following the entry of the Consent Decree was frivolous and Petitioners' were liable for attorneys' fees incurred by Respondent Reeves who successfully defeated the intervention and defended the Consent Decree. The Eleventh Circuit stated:

> The intervenors chose to use intervention as the procedure mechanism to pursue their claims. This means, however, was clearly unavailable to them under existing case law. Therefore, the issue is not whether the intervenors' claims have merit, but whether their decision to pursue those claims by filing a motion to intervene was frivolous or unreasonable. Considering the long delay between the Consent Decree and the motion to intervene and the decision by a panel of this Court that the intervenors failed to satisfy even one prong of the four prong Monsanto test, we agree with the plaintiffs that the intervenors' attempts to

> inject their claims into this litigation was frivolous and makes them liable to the plaintiffs for reasonable attorneys' fees.
>
> 791 F. 2d at 1485

The question raised by Petitioners is whether their motion to intervene was frivolous.

Petitioners argue their motion to intervene was justified by existing case law at the time it was filed therefore the Eleventh Circuit determination their action was frivolous was unwarranted.

The standard for analyzing the timeliness of a motion to intervention at the time the intervention was filed was set forth in Stallworth v. Monsanto, 558 F. 2d 257 (5th Cir. 1977). The Stallworth decision list four factors to be considered in assessing the timeliness of an intervention.

The Eleventh Circuit in Reeves v. Wilkes, (Reeves I) 754 F. 2d 965 (11th Cir. 1985), assessed the facts of the case with the four factor test articulated in Stallworth. Each Stallworth

factor was examined separately and applied to the facts of the case. The Eleventh Circuit found the Petitioners failed to meet any part of the four factor test.

Reeves I did not represent a departure from the requirement of Stallworth. Petitioners failed to meet the standards of existing case law at the time the intervention was filed. There was no ex post facto application of case law.

The Stallworth decision was the case law at the time the intervention was filed and the Stallworth factors were applied in this case. Petitioners are asking for a reassessment of the facts of this case with the existing case law at the time the intervention was filed; said case law is Stallworth. Petitioners seek a different conclusion based on the facts and law considered by the Eleventh Circuit in Reeves I and Reeves II.

CONCLUSION

The Eleventh Circuit decisions in Reeves I and Reeves II were correct. The petition for a writ of certiorari to reconsider the findings of frivolousness should be denied.

Respectfully submitted,

Robert E. Steele, Jr.
Attorney for Plaintiffs

614 Fulton Federal Building
Macon, Georgia 31201
(912) 742-2597

CERTIFICATE OF SERVICE

I, Robert E. Steele, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Respondents herein, hereby certify that on the December 1, 1986 pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing of the foregoing Respondent Reeves Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein, as follows:

On James Harrell, et al., Petitioner herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

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(404) 685-8700

This being the above named Petitioners' counsel of record.

On Ray Wilkes, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. O. Hale Almand, Jr.
Sell & Melton
Post Office Box 229
Macon, Georgia 31297

This being the above-named Respondents' counsel of record.

All parties required to be served have been served.

This 1 day of December, 1986.

Robert E. Steele, Jr.

MABRY & STEELE
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Macon, Georgia 31201
(912) 742-2597

State of Georgia

County of Bibb

I, Robert E. Steele, Jr., depose and say that I am the attorney of record for the Respondent Reeves herein, and that on December 1, 1986 pursuant to Rule 28, Rules of the Supreme Court, I placed in the United States mail, with adequate first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, forty (40) copies of the foregoing Respondent Reeves Brief in Opposition to Petition for Writ of Certiorari. To my knowledge this mailing took place within the time permitted by law for the filing of said Response.

Robert E. Steele, Jr.
ROBERT E. STEELE, JR.

SWORN TO AND SUBSCRIBED before me
this 25th day of November, 1986.

Irma Kelley
Notary Public
My Commission Expires: 4/29/89

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Respondents:

Robert E. Steele, Jr.

Robert E. Steele, Jr.
614 Fulton Federal Building
Macon, Georgia 31201

The Clerk is requested to notify counsel of action of the Court by means of regular mail.

In this case the person to be notified for Respondents is:

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